REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL
MSCA CIVIL APPLICATION CAUSE No. 46 OF 2022
(being Judicial Review Cause no. 44 of 2022, High Court Lilongwe District Registry)

In the matter between the:

THE STATE (on application by ALEX MAJOR) APPLICANT

and

THE SECRETARY GENERAL OF THE
MALAWI CONGRESS PARTY RESPONDENT

RULING

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1. The Applicant, Alex Major, appearing through the legal practitioners Messrs. Henderson, Whitney & Associates, filed an *ex parte* application seeking leave to commence proceedings for judicial review at the High Court, Lilongwe District Registry. This application was made without notice basis seeking permission to institute proceedings for judicial review in accordance with Order 19 Rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017. The Applicant, identifying himself as an ordinary member and sympathiser of the Malawi Congress Party, specifically requested the court to grant permission to initiate judicial review proceedings against the decision rendered on the 5th of July 2022 by the Secretary General of the Malawi Congress Party, which involved the Applicant's expulsion from the party without a prior disciplinary hearing. Furthermore, the Applicant sought interim relief in the form of either a stay order or an injunction to prevent the Respondent from enforcing the decision expelling him from the political party's membership.

2. Later, on the 15th of September 2022, when the Applicant was called upon to make submissions regarding the suitability of the Respondent for judicial review, supplementary skeleton arguments were filed in support of the initial application. On the same date, the High Court declined to grant permission for commencing the judicial review against the Respondent and instead made an order directing that the matter be initiated through a summons accompanied by an application for an injunction.

3. Moving forward to the 27th of September 2022, the Applicant proceeded to submit the same *ex parte* application before the Supreme Court of Appeal of Malawi, citing the authorities as being under section 7 of the Supreme Court of Appeal Act, Order II of the Supreme Court of Appeal Rules, and Order 19 rules 20 and 23 of the Courts (High Court) (Civil Procedure) Rules, 2017. Noting the nature of the relief sought, the Court made an order directing that the application should proceed as an *inter partes* hearing on a fixed date and provided guidelines for the submission and exchange of documents. During the hearing the Respondent failed to appear despite proper service of the court documents, leading the court to proceed with the Applicant's application in the Respondent's absence.

4. Upon examining the documentation filed by the Applicant in support of the motion, the Court deemed it necessary to thoroughly evaluate whether the procedural requirements for bringing the application before the court had been duly met and complied with.

5. The relevant statutory provisions governing the practice and procedure in such matters are outlined in section 8 of the Supreme Court of Appeal Act, Chapter 3:01 of the Laws of Malawi, which aptly states as follows:

> *"the practice and procedure of this court shall be in accordance with the Supreme Court of Appeal Act and any rules of the court made thereunder.*
>
> *Provided that if this Act or any rules of court made thereunder does not make provision for any particular point of practice and procedure, then the practice and procedure of the court shall be-*
>
> *(b) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed by the Court of Appeal in England."* [emphasis supplied]

6. This legal framework has been elaborated upon in various judicial precedents, including the notable cases of *Mbale v Maganga* (Misc. Civil Appeal 21 of 2013) [2015] MWSC 1 (31 May 2015) and *NBS Bank PLC v Dean Lungu t/a Deans Engineering Co Ltd* (Commercial Cause 14 of 2015; MSCA Civil Appeal 83 of 2019) [2019] MWSC 11 (7 November 2019). In the *Mbale v Maganga* decision, the Court provided valuable insights into the interpretation and application of the relevant legal provisions and held:

> *"52. By S. 8 of the Supreme Court of Appeal Act (the Act) (Cap 3:01 of the Laws of Malawi) the practice and procedure that applies in this Court is in accordance with the Act and any rules of court made there under. The proviso to S. 8 takes the issue further. It says that if the Act or any rules made there under do not make provision for any particular point of practice and procedure, then the practice and procedure of this Court shall be…*
>
> > *(b) in relation to civil matters, as nearly as maybe in accordance with the practice for the time being observed by the Court of Appeal in England".*

7. Recently, this Court in *Jeffrey, Nankhumwa & Chazama v Mutharika, Mwale & Democratic Progressive Party* (MSCA Misc. Application 65 of 2023) [2024] MWSC 1 (3 January 2024 stated that:

> *"Having distinguished the present case from The State (on the application of the Malawi Revenue Authority) v Chairperson of the Industrial Relations Court and Mbilizi, which was a judicial review matter, it remains pertinent to mention that in judicial review proceedings, there is a specific or enabling provision under Part 54.12 of the Civil Procedure Rules of England 1998, which applies under proviso (b) to section 8 of the Supreme Court of Appeal Act. The provision allowing an applicant to file a new application is as follows:*
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> > *"Where permission has been refused in a civil case after a hearing by the High Court, the person seeking permission may apply to the Court of Appeal within 7 days of the decision of the High Court refusing permission (CPR r. 52 15). The Court of Appeal may, on considering that application, grant permission to apply for judicial review and, if so, the claim will proceed in the High Court in the usual way (CPR r. 52 15 (3) and (4)).*"

8. For the time being the practice and procedure observed by the Court of Appeal of England is the Civil Procedure Rules of England, 1998. It must be noted, however, that invariably the Court applied the Rules of the Supreme Court 1965. It was thus provided under Order 53 rule 1-14/34 of the Rules of the Supreme Court:

> *"Where leave to apply for judicial review is refused in a non-criminal case either by a single Judge or a Divisional Court, the application for leave is can be renewed before the Court of Appeal within seven days under O.59, r.14 (3)."*

9. For that reason, it is not surprising that this Court in the cases of *State (On application of Gertrude Hiwa) v Office of the President and Cabinet and Secretary to the President and Cabinet*, MSCA Civil Cause no. 1 of 2021 (unreported); *State (On the Application of Flatland Timbers Ltd) v Department of Forestry* (Civil Case 25 of 2021) [2021] MWSC 15 (7 July 2021); *Malawi Communications and Regulatory Authority [MACRA] v Fatch, Itaye and Others* MSCA Miscellaneous Civil Application no. 39 of 2021; *State (On Application by Ashraf Ibrahim Lunat) v Inspector General of Malawi Police Service* MSCA Miscellaneous Civil Application no. 48 of 2021 and *S (on the Application of Malawi Revenue Authority) v Chairperson of Industrial Relations Court and Mbilizi* (Miscellaneous Case 56 of 2021) [2022] MWSC 30 (31 January 2022) held that there is no need to appeal against a decision declining leave for judicial review. The correct approach is to make a fresh application before this Court.

10. Be that as it may, and as supported by *NBS Bank PLC v Dean Lungu t/a Deans Engineering Co Ltd* (*supra*), the rules applicable now are the said Civil Procedure Rules of England, 1998. Part 52 rule 15 of the Civil Procedure Rules, 1998 provides as follows:

> *"(1) Where permission to apply for Judicial review has been refused at a hearing in the High Court, the person seeking that permission may apply to the Court of Appeal for permission to appeal.*
>
> *(2) An application in accordance with paragraph (1) must be made within 7 days of the decision of the High Court to refuse to give permission to apply for judicial review.*
>
> *(3) On an application under paragraph (1) the Court of Appeal may instead of giving permission to appeal, give permission to apply for judicial review.*

(4) Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (3), the case will proceed in the High Court unless the Court of Appeal orders, otherwise." [Emphasis supplied]

11. Part 54 rule 12(2) of the Civil Procedure Rules, 1998, delineates the provision wherein in civil cases, subsequent to a hearing at the High Court where permission has been declined, the person seeking such permission is afforded the opportunity to file an application to the Court of Appeal within a stipulated time frame of 7 days following the decision reached by the High Court in refusing permission (CPR r. 52.15). It is imperative to acknowledge that the specific application alluded to under Part 54 rule 12(2) of the Civil Procedure Rules, 1998, necessitates alignment with the format (nature) of the application as delineated in Part 52.15, mentioned previously. Upon scrutiny of such an application by the Court of Appeal, there exists the potential for the granting of permission to proceed with an appeal for judicial review, subsequently leading to the progression of the claim within the High Court in the usual manner.

12. The nature of the application distinguishes the Rules of the Supreme Court, 1965 as they applied at the time from the Civil Procedure Rules, 1998 as they apply now. Currently, the aggrieved party may apply for permission to appeal, and the Court may grant leave to apply for judicial review rather than permission to appeal.

13. The aforementioned provisions make it evident that where an application for permission to apply for judicial review has been declined by the High Court in Malawi, the Applicant may apply to this Court for permission to appeal. On considering the application, however, the Court may grant permission to apply for judicial review rather than permission to appeal. Furthermore, Part 52. 15(3) empowers the Court of Appeal to sever the "*Gordian knot"* and grant permission to apply for judicial review instead of permission to appeal.

14. Within the context of the present case, it is evident that the Applicant has failed to adhere to the established practice as outlined in the Rules of Supreme Court 1965, or indeed the contemporary practice associated with initiating an application for permission (also referred to as leave) for an appeal. The Applicant has invoked section 7 of the Supreme Court of Appeal Act, Order II of the Supreme Court of Appeal Rules, and Order 19 rules 20 and 23 of the Courts (High Court) (Civil Procedure) Rules in support of the aforementioned application. This Court finds that apart from failing to bring the application under the appropriate enabling provisions, there is a lack of compliance with the aforementioned stipulated requirements. Section 7 of the Supreme Court of Appeal Act stipulates that an individual member of this Court possesses the

authority to exercise any power vested in the Court that does not encompass the hearing or determination of an appeal, but such provision does not pertain to the present application under consideration.

15. Moreover, the application is not fitting for consideration under Order II of the Supreme Court of Appeal Rules given that it specifies the requirement for the practice and procedure of the Court to be conducted in a manner substantially congruent with the practices observed within the High Court when exercising the original jurisdiction of the Court. The reliance placed on Order 19, rules 20 and 23 of the Courts (High Court) (Civil Procedure) Rules is deemed misplaced. These rules, upon which reliance is established, delineate the grounds necessary for an application for judicial review, the *locus standi* required, the essential permission indispensable for the commencement of judicial review in the High Court, and the prescribed timeframe within which a person must lodge an application for judicial review after the formulation of the decision or legislation under scrutiny. It is essential to recognize that these rules do not serve as the enabling provision for seeking leave to initiate judicial review within this Court.

16. Conclusively, the Court has determined that the application is procedurally incompetent, having been improperly and deficiently presented before the Court. It is found that Order II of the Supreme Court of Appeal Rules and Order 19, rules 20 and 23 of the Courts (High Court) (Civil Procedure) Rules are irrelevant and cannot be invoked as legal authority to substantiate the current application. The appropriate law under which the application of this nature is supposed to have been brought before this Court is section 8 of the Supreme Court of Appeal Act as read together with Part 52 rule 15 of the Civil Procedure Rules, 1998.

17. The cases of *Kainja v Director of the Anti-Corruption Bureau, Director of the Public Prosecution and Attorney General* (Judicial Review Cause 48 of 2022) [2022] MWHCCiv 7 (3 October 2022) and *Chris Chaima Banda v Rep (Anti-Corruption Bureau)* (Misc. Criminal Application 10 of 2020) [2022] MWHC 55 (25 May 2022) have been meticulously analyzed to determine the implications of filing an application under incorrect legal provisions. The resulting decisions from these cases have varied significantly, highlighting the complexity of legal interpretations. Nevertheless, it is imperative to emphasize that this Court acknowledges its autonomy and is not bound to conform to the High Court judgments made in the aforementioned cases. Delving into the specifics of the case of the case of *Kainja v Director of the Anti-Corruption Bureau and Others* it was determined by the High Court that an application lacking the citation of the relevant legal framework is tantamount to an

application grounded on an erroneous legal basis (at paragraph 24). Consequently, both applications are deemed destined to fail and are subject to immediate dismissal. Furthermore, within the context of the case of *Kainja v Director of the Anti-Corruption Bureau and Others* reference was made to a precedent set by the Kenyan jurisdiction in the case of *Aviation & Allied Workers Union Kenya v. Kenya Airways Limited & 3 others* [2015] eKLR wherein the Kenyan Supreme Court of Appeal emphasized the necessity of adhering to the appropriate legal provisions when approaching the court:

> *"... It is trite law that a Court of law has to be moved under the correct provisions of the law. A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make 'omnibus' applications, with ambiguous prayers, hoping that the Court will grant at least some."*

18. The position adopted by this Court finds resonance in the elucidation provided in the case of *Malawi Housing Corporation v Western Construction Company Ltd* [2013] MLR 195 (SCA) where it was explicitly stated that applications filed under erroneous legal frameworks or provisions and are "not part and parcel of the law and practice" and are outside the established legal framework for civil proceedings are liable to be dismissed.

19. Consequently, the act of initiating an application under inappropriate legal provisions represents a procedural irregularity that could potentially result in the dismissal of the application. Instances have arisen where applications have been lodged under incorrect legal provisions, yet the affidavit and skeleton arguments submitted by the Applicant manifest a clear intent to align with the correct legal framework. Under such circumstances, the Court may exercise leniency and waive such irregularities. However, should it become evident from the affidavit and skeleton arguments that the Applicant harboured no intention of aligning the application with the appropriate legal provisions, this oversight cannot be disregarded as it reflects incompetency on the part of the Applicant's legal practitioner. In the present case, the Applicant erroneously referenced legal provisions in support of the application, an irregularity further echoed in the skeleton arguments presented within the supporting documents. Such a grave oversight alters the essence of the application, rendering it inconsequential to the case at hand, cannot be cured and is beyond redemption within the jurisdiction of this Court.

20. Considering the reasons given above, the Court dismisses the applicant's application for permission to apply for judicial review, as it is improperly and incompetently brought. The application for a stay or interlocutory injunction automatically falls away

21. The Court makes no order regarding costs.

Dated this 14th day of June 2024 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga
JUDGE

Ayuba James	:	Legal practitioner for the Applicant.
Respondent	:	Not served/absent.
Mrs Mthunzi	:	Senior Court Clerk.